

23 June 2021

FILE REF: SHA/23397
DECISION MAKING BODY: NHS COMMISSIONING BOARD (NHS ENGLAND)
GDS CONTRACTOR: THACKERAY DENTAL CARE
DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005 (THE REGULATIONS)
RE: END OF YEAR RECONCILIATION OF UNITS OF DENTAL ACTIVITY (UDAS)

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1 Outcome

- 1.1 Based on the information provided to me, I am of the view that the methodology used to calculate the UDAs for the Contractor was fair and proportionate.
- 1.2 I note that neither party has requested interest in relation to this dispute and I determine that no interest shall be applied to the clawback of the overpayment made by NHS England to the Contractor.

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(GENERAL DENTAL SERVICES
CONTRACTS) REGULATIONS 2005

RE: END OF YEAR RECONCILIATION OF
UNITS OF DENTAL ACTIVITY (UDAS)

Tel: 0203 928 2000
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1 INTRODUCTION

- 1.1 The Contractor has referred the dispute in relation to its General Dental Services (“GDS”) contract for dispute resolution under the provisions of Paragraph 54 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the “Regulations”).
- 1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter received 30 September 2020 the Contractor applied to NHS Resolution for dispute resolution.
- 2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -
 - 2.2.1 Contractor’s application for NHS dispute resolution received on 30 September 2020 together with enclosure;
 - 2.2.2 Email from the Contractor dated 10 November 2020 together with enclosures;
 - 2.2.3 Email from the Contractor dated 17 November 2020 together with enclosure;
 - 2.2.4 Email from the Contractor dated 23 November 2020;
 - 2.2.5 Email from the Contractor dated 25 January 2021;
 - 2.2.6 Email from NHS England dated 3 February 2021 with enclosure;
 - 2.2.7 Email from NHS England dated 16 February 2021;

- 2.2.8 Letter from the Contractor dated 26 February 2021;
 - 2.2.9 Email from the Contractor dated 2 March 2021;
 - 2.2.10 Emails from the Contractor dated 2 March 2021 together with enclosures;
 - 2.2.11 Email from the Contractor dated 5 March 2021;
 - 2.2.12 Second email from the Contractor dated 5 March 2021;
 - 2.2.13 Email from NHS England dated 12 March 2021 together with enclosure;
 - 2.2.14 Email from the Contractor dated 15 March 2021;
 - 2.2.15 Second email from the Contractor dated 15 March 2021;
 - 2.2.16 Email from the Contractor dated 16 March 2021;
 - 2.2.17 Emails from the Contractor dated 24 March 2021;
 - 2.2.18 Email from the Contractor dated 29 March 2021 together with enclosure;
 - 2.2.19 Email from the Contractor dated 31 March 2021;
 - 2.2.20 Email from NHS England dated 29 April 2021 together with enclosure; and
 - 2.2.21 Email from the Contractor dated 5 May 2021.
- 2.3 I note the comment in the NHS England observations that "... NHS England and NHS Improvement (NHSE/I) would like to take the opportunity to provide further representations on this matter." I am satisfied that the comments that follow are not further, new, representations and are comments on representations previously made or observations on the Contractor's representations. These observations have been provided to the Contractor who has not been disadvantaged.

3 PARTIES SUBMISSIONS

The Contractor's application

Email to NHS Resolution received 30 September 2020

- 3.1 The Contractor is writing to escalate a dispute it is currently having with the NHS with reference to the Contractor's recorded year end reconciliation figures.
- 3.2 The Contractor received a letter on 29 July 2020 detailing its year end reconciliation recording a shortfall of 253.8 UDAs so a recovery of £8,443.93. This was disputed by via email originally on 14 August 2020.
- 3.3 On 17 August 2020 the Contractor emailed to request a full breakdown of the figures that had been used to reconcile the figure that had been documented. This request was acknowledged and the breakdown was received by the Contractor via email on 20 August 2020.
- 3.4 The Contractor then looked into this and tried to reference this to the figures it had on its software system, 'System for Dentists'. The Contractor also took the time to speak with its provider who advised the Contractor that the report it had been using to reconcile the figures was definitely the transmitted figure and not just what had been logged onto the Contractor's systems. The Contractor has included a copy of this system report for information. The Contractor then took the figure that the NHS had provided it with for Option 3 for the Contractor's March figure due to the Covid-19 pandemic.

- 3.5 The Contractor's March 2020 figure was recorded as 83 by the NHS. The Contractor's figure for March if taken off and added to the Contractor's total, results in a figure of 1183.80 so a shortfall of 16.2 UDA's and would be a recovery of £538.97.
- 3.6 The Contractor then emailed again on 20 August 2020 to further dispute the figures after it had investigated them as detailed above.
- 3.7 The Contractor then emailed again on 18 September 2020 to request an update as it had not heard anything back after its correspondence with the NHS on 20 August 2020. The Contractor received a response from NHSBSA on 21 September 2020 advising it to escalate this to NHS Resolution if it was still in dispute. The email also documented that the Contractor had never provided any evidence of its recorded figures but this has never been requested from the Contractor in any of the correspondence.

4 Representations

NHS England's representations letter to NHS Resolution dated 12 March 2021

- 4.1 Providers who hold an NHS dental contract are subject to the Year End reconciliation process (as per the NHS England Policy Book for Primary Dental Services 2018). The reconciliation process is to ensure that activity is being delivered against contracted requirements. The activity data is sent by Providers to NHS Dental Services (NHS DS) by way of FP17 submissions on completed courses of treatment. NHS DS provide Providers with a monthly total of the notifications sent by the Providers to NHS DS.
- 4.2 From April 2020, the NHS Business Services Authority (BSA) (NHS Dental Services) undertook the Year End reconciliation process for 2019/20. NHS BSA regularly liaised with NHS England and carried out all reconciliation activities and functions, adhering to the NHS England Policy Book for Primary Dental Services (2018). The outcomes of the Year End reconciliation process undertaken by NHS BSA were approved by NHS England prior to the 'Year-End Reconciliation' letters being sent to providers in July 2020.
- 4.3 The Covid-19 pandemic had a significant impact on provider activity, due to dental services being suspended during the month of March 2020, in line with the government national lockdown restrictions. To mitigate the financial effects of the pandemic, NHS England, in collaboration with NHS BSA, devised the 'Options' mechanism. In addition to the usual Year End reconciliation actions, an Option would be applied to a Provider's contract in order to disadvantage them the least from the financial effects of the Covid-19 pandemic. This was a National Level approach, applied to all NHS dental contracts in England.
- 4.4 The Option which offered the least disadvantage to the Contractor was Option 3; which included activity from April 2019 to February 2020 (11 months), plus an average UDA delivery over an appropriate 3-month period in 2019/20 to account for the 12 month of the year. The highest 3-monthly average calculated for the Contractor during 2019/20 was 87 UDA. This was added to their yearly total, replacing March 2020 activity of 43 UDA. Option 3 provided a better position for the Contractor and would reduce their claw back figure.
- 4.5 Prior to referring the matter to NHS England, NHS BSA supplied the provider with a breakdown of the figures used for Option 3, which they again confirmed will not match what is displayed on the providers system. The Contractor was advised that Option 3 was identified as the financial position that disadvantaged the provider the least in terms of performance. As such, it was not possible to change the selected Option.
- 4.6 NHS BSA contacted NHS England on 21 August 2020 to confirm the Contractor was unhappy with the outcome of the Year end reconciliation process and requested that the Contractor's concerns be escalated to the [local] Commissioning Team. Correspondence between the provider and NHS BSA were provided to NHS England for internal review.
- 4.7 Due to the impact of the Covid-19 pandemic, and the efforts of launching the Option system to support providers, there was no formal internal appeals process agreed. However, with the

disputes which were escalated by NHS BSA, an internal review was conducted, and NHS England's position on the matter was communicated. Providers were always provided with the information to escalate a concern to the NHS Resolution service, if they were unsatisfied with the outcome of the internal review.

- 4.8 The Contractor felt that NHS BSA were not including all of the activity the practice had undertaken during the year, and that their practice software was reporting a higher number of UDA. NHS BSA had explained to the Contractor that it was not possible to base the reconciliation on the Contractor's own figures, as provider software is set up to accommodate the standard financial year. This meant that the software would be unable to match the figures used for the year end reconciliation as the calculations for year end and Option 3 were calculated by completion date, as opposed to the month that the UDA were submitted.
- 4.9 It was noted at this point that the Contractor had not provided any data evidence to support their claims that the practice had completed more UDA activity than the NHS BSA letter dated 29 July 2020 confirmed.
- 4.10 On 18 September 2020 NHS England provided an email response to NHS BSA to clarify the findings of the internal review. The body of the response has been included in italics in the letter to the Contractor from NHS BSA, dated 21 September 2020. The response confirmed that NHS England concurred that the Option applied to the Contractor's year end position was the Option which disadvantaged him the least.
- 4.11 NHS England also confirmed that it has and will continue to use NHS BSA data for the measurement of Year End reconciliation. Providers have a duty to effectively manage their contracts by undertaking regular reconciliation of activity against the monthly schedules produced by NHS BSA. This provides the opportunity for Providers to escalate any discrepancies in a timely manner during the financial year.
- 4.12 As previously mentioned, Providers are aware that they are required to send activity data to NHS Dental Services (NHS DS) by way of FP17 submissions on completed courses of treatment. NHS BSA will only review activity data received via this method. NHS England can confirm that the Year-End figures for 2019/20 have been calculated using the exact same mechanisms for completed FP17 submissions as in previous years.
- 4.13 Therefore, whilst NHS England understand that the Contractor is disappointed that their Year-End position has resulted in a claw back payment of £8,443.93, the Contractor supports the recommendations of Option 3 applied by the NHS BSA, which has disadvantaged the provider the least.
- 4.14 It is unfortunate that the Provider has been unable to complete their activity to 100% for the year 2019/20. NHS England are unable to consider additional UDA activity recorded on the practice's own software, which does not meet the NHS BSA criteria of FP17 submissions which has been completed within the year 2019/20.

The Contractor's representations to NHS Resolution dated 26 February 2021

- 4.15 Many thanks for NHS Resolution's email of the 21 February. This is not the Contractor's full response as it is collating further information to support its case.
- 4.16 The Contractor can confirm there has been no communication from the Local Area team other than a solitary brief email **after** raising the matter with them, along the lines of '*We agree with the incorrect figures*' and little else. Despite requesting a full and accurate breakdown from them, the Contractor has heard nothing else. To this date the Contractor has also not received the copy of its contract that was requested some time ago via email. To say their response has been dismissive would be generous, but entirely justified. It would be the Contractor's position that they have refused to engage appropriately in this matter, hence the Contractor's initial approach to NHS Resolution for solution before taking this issue further in the courts as is the Contractor's right given it is not a Public Body.

- 4.17 Despite the Local Area Team (LAT) assuming the Contractor does not do much in the way of work given their underestimation of its output, the Contractor can assure them that it is quite busy clinically and do not always have the time to respond as swiftly as it would like to matters of urgency such as this.
- 4.18 The Contractor hopes to have some documentation shortly that will support the Contractor's assertion that it has produced a far higher number of UDA's than the LAT seem to think.

5 Observations

NHS England's letter to NHS Resolution dated 28 April 2021

- 5.1 Upon review of the additional communications provided by the Contractor and Systems for Dentists, the rationale provided for the underperformance comes under an IT system failure. This is listed in Annex 49, of the NHS England Policy Book for Primary Dental Services 2018 as a non-allowable circumstance.
- 5.2 It has been clearly stated for many years via communications that contract activity should be monitored via Compass and not company software. As mentioned in NHS England's first letter of representations, dated 12 March 2021, Providers are aware that they are required to send activity data to NHS Dental Services (NHS DS) by way of FP17 submissions on completed courses of treatment. NHS Business Services Authority (NHS BSA) will only review activity data received via this method.
- 5.3 Systems for Dentists referred to information received from NHS BSA stating that there is a fault with how the inbox has been set up for the Contractor, however, no evidence from NHS BSA has been submitted to support this claim. NHS BSA process FP17s nationally and NHS England have not received queries regarding unaccounted activity from any other Dental Provider in relation to the same period raised by the Contractor.
- 5.4 The position remains unchanged, that NHS England has and will continue to use NHS BSA data for the measurement of Year End reconciliation. Providers have a duty to effectively manage their contracts by undertaking regular reconciliation of activity against the monthly schedules produced by NHS BSA. This provides the opportunity for Providers to escalate any discrepancies in a timely manner during the financial year.
- 5.5 The letter from the Contractor to NHS Resolution, dated 26 February 2021, also refers to NHS England not engaging with the provider. However, when the provider initially appealed their year-end position with NHS BSA, NHS England provided comments and reviewed the case on their request. NHS England can confirm that it responded to all of the Contractor's emails, and NHS BSA provided a full, accurate breakdown of their year-end position on request.
- 5.6 From April 2020, the NHS Business Services Authority (BSA) (NHS DS) undertook the Year End reconciliation process for 2019/20 on behalf of NHS England. NHS BSA regularly liaised with NHS England and carried out all reconciliation activities and functions, adhering to the NHS England Policy Book for Primary Dental Services (2018). The outcomes of the Year End reconciliation process undertaken by NHS BSA were approved by NHS England prior to the 'Year-End Reconciliation' letters being sent to providers in July 2020. It was therefore appropriate that NHS BSA provided the Contractor with his complete breakdown of figures for the year.
- 5.7 NHS England would like to note that following an organisation-wide restructure in April 2020, the NHS England Primary Care Dental team in the East Midlands is now a particularly lean team, with responsibility for over 600 NHS dental contracts in the region. NHS England have continued to make every effort to engage with providers in a timely manner, even during the unprecedented height of the Covid-19 pandemic. NHS England are sorry to hear that the Contractor feels this was not the case.
- 5.8 The Contractor did request his NHS contract; however, NHS England was unable to provide a copy. This was due to all office based NHS England staff observing the government

guidelines for working from home during the Covid-19 pandemic, and there being no electronic copy of the original issued GDS contract held on NHS England's network. Providers are issued with a signed copy of their contract, and it is expected that a provider would retain this for their records. NHS England provided NHS resolution with confirmation of the type, terms and conditions and start date of the contract when requested to assist with their investigation.

- 5.9 NHS England acknowledge that the Contractor expressed a wish for a review of year-end outcomes for other years to be undertaken, and that this has been refused due to the scope of the current investigation.

6 CONSIDERATION

- 6.1 This application for dispute resolution relates to the underperformance of Units of Dental Activity ("UDAs") by the Contractor for the financial year 2019/2020. The Contractor seeks to dispute NHS England's methodology for calculating the number of UDAs the Contractor has performed, and the recovery of monies resulting from the underperformance.

- 6.2 I note the Contractor's comments in its email to NHS Resolution dated 15 March 2021 sought to widen the time period during which it has claimed the reconciliation figures used by NHS England are incorrect. I am mindful that, to extend the scope of my adjudication, would require a separate application for dispute resolution made in accordance with the Regulations.

- 6.3 I note the Contractor's application for dispute resolution states:

6.3.1 *"The Contractor is writing to escalate a dispute it is currently having with the NHS with reference to the Contractor's recorded year end reconciliation figures.*

6.3.2 *The Contractor received a letter on 29 July 2020 detailing its year end reconciliation recording a shortfall of 253.8 UDA's so a recovery of £8443.93. This was disputed by via email originally on 14 August 2020.*

6.3.3 *On 17 August the Contractor emailed to request a full breakdown of the figures that had been used to reconcile the figure that had been documented. This request was acknowledged and the breakdown was received by the Contractor via email on 20 August 2020.*

6.3.4 *The Contractor then looked into this and tried to reference this to the figures it had on its software system, 'System for Dentists'. The Contractor also took the time to speak with its provider who advised the Contractor that the report it had been using to reconcile the figures was definitely the transmitted figure and not just what had been logged onto the Contractor's systems. The Contractor has included a copy of this system report for information. The Contractor then took the figure that the NHS had provided it with for Option 3 for the Contractor's March figure due to the Covid 19 pandemic.*

6.3.5 *The Contractor's March figure was recorded as 83 by the NHS. The Contractor's figure for March if taken off and added to the Contractor's total, results in a figure of 1183.80 so a shortfall of 16.2 UDA's and would be a recovery of £538.97.*

6.3.6 *The Contractor then emailed again on 20 August to further dispute the figures after it had investigated them as detailed above.*

6.3.7 *The Contractor then emailed again on 18 September 2020 to request an update as it had not heard anything back after its correspondence with the NHS on 20 August. The Contractor received a response on 21 September 2020 advising it to escalate this to NHS Resolution if it was still in dispute. The email also documented that the Contractor had never provided any evidence of its recorded figures but this has never been requested from the Contractor in any of the correspondence."*

- 6.4 Towards the end of the financial year 2019/2020, on 11 March 2020 the World Health Organisation declared the Covid-19 outbreak a global pandemic. As a result of the pandemic, England alongside many other countries entered into periods of societal lockdown.
- 6.5 By letter dated 25 March 2020, NHS England wrote to dental contractors advising that *“All routine, non-urgent dental care including orthodontics should be stopped and deferred until advised otherwise...”* and setting out a position as regards contracts and funding for 2019-20 contract reconciliation.
- 6.6 I note that the end of year reconciliation statement dated 29 July 2020 was sent to the Contractor who then emailed the NHS BSA on 14 August 2020 (I have not been provided with a copy) to dispute the clawback indicated in the letter. I further note that the NHS BSA’s email to the Contractor dated 21 September 2020 provided NHS England’s response, and informed the Contractor of its right to make an application for dispute resolution to NHS Resolution.
- 6.7 I have been provided with a copy of the email dated 21 September 2020 from the NHS BSA to the Contractor which indicates that the matter was escalated to it from the Local Area Team on 21 August 2020. The email from the NHS BSA includes the following quote from NHS England:
- 6.7.1 *“I have reviewed all of the information provided and can confirm that I agree with the outcome provided to Mr Thackeray. I accept that COVID-19 has affected all practices and this has been taken into account during the year end process and what lead to the 3 option system being introduced, to ensure that an outcome that would disadvantage the practice least could be applied.*
- 6.7.2 *I note at this point that that the provider only included anecdotal evidence to date, and has not included a breakdown of monthly figures from their software, nor have screen shots of their system been included to support their claim.*
- 6.7.3 *As stated by the NHS BSA colleagues below, the data measured on a providers software is measured differently to that of NHS BSA, therefore it is unlikely that these will ever truly match. However NHS BSA will always take the data from compass, ensuring a consistent approach year on year, and it is the responsibility for the provider to ensure that the data provided by their software matches the data held by NHS BSA. I recommend the provider reviews this at regular intervals throughout the year to ensure that the data matches when the time comes to reconcile. If Mr Thackeray is not satisfied with this position, he does have the right to contact the resolutions team.”*
- 6.8 The Contractor’s year end position therefore remained unchanged and re-payment would commence from 1 October 2020 payments. The Contractor was advised that it may wish to refer the matter to NHS Resolution. On this basis I am satisfied that there has been some an attempt at local resolution as set out on the GDS Contract; however the parties have been unable to resolve the dispute and therefore the Contractor has referred the matter to NHS Resolution. There is no dispute from either party that local dispute resolution has not been entered into, and therefore I will proceed to consider the matter before me.
- 6.9 I note that the Contractor holds a GDS Contract, a copy of which has not been provided. Both parties agree that a GDS contract is applicable in this case. On that basis, I am satisfied that I am able to determine this dispute.
- 6.10 I note that there is no dispute that the Contractor has a target of 1,200.00 UDAs or that the Contractor did not manage to deliver this in the financial year 2019/20.
- 6.11 There is no dispute between the parties that all routine, non-urgent dental care treatment had to cease in late March 2020 as a result of the COVID-19 pandemic. There is no dispute between the parties that this was communicated by NHS England.

- 6.12 I note that in its response to the application for dispute resolution to NHS Resolution, NHS England refers to all providers who hold an NHS dental contract being subject to a year end reconciliation process in accordance with the NHS England Policy Book for Primary Dental Services 2018. I note NHS England’s comment that based upon activity data sent by the Contractor to NHS Dental Services (NHS DS) by way of FP17 submissions on completed courses of treatment, the process ensures that activity is being delivered against contracted requirements. I note that NHS DS issue providers with a monthly total of the notifications sent by the provider to NHS DS. The Contractor has not disputed the principle of the year end reconciliation process in particular by drawing attention to any relevant part of the NHS England Policy Book for Primary Dental Services 2018 which would support its dispute.
- 6.13 I note NHS England’s comment that a year-end reconciliation process for 2019/20 was undertaken from April 2020. I understand that NHS DS undertook the process, and liaised with NHS England over the outcome prior to a letter being sent to the Contractor in July 2020.
- 6.14 I note NHS England’s reference to its recognition that the Covid 19 pandemic had a significant impact on provider activity. I note that NHS England in collaboration with NHS BSA had devised an options mechanism which meant that in addition to the usual year end reconciliation actions, an option would be applied to the Contractor’s contract in order to disadvantage them least from the financial effects of the Covid 19 pandemic. I note that this was a national approach applied to all NHS dental contracts in England. I accept that NHS England followed this national approach in seeking to least disadvantage the Contractor, as a result of the pandemic.
- 6.15 I note NHS England’s comment that Option 3 offered the least disadvantage to the Contractor. I note Option 3 included using activity data from April 2019 to February 2020 (11 months) plus an average UDA delivery over an appropriate 3-month period in 2019/20 to mitigate the impact of the pandemic. The highest 3-monthly average calculated for Thackeray Dental Care Ltd during 2019/20 was 87 UDA. This was added to their yearly total, replacing March 2020 activity of 43 UDA.
- 6.16 The year-end reconciliation letter to the Contractor dated 29 July 2020 states that:
- 6.16.1 *“We have finalised your year-end delivery position based on the FP17/FP17(O) data you have submitted using the mechanisms for financial reconciliation set out in the NHS England and NHS Improvement letters to all providers on 25 March 2020 and 15 April 2020 to mitigate the impact of COVID-19 for providers in respect of the 2019/20 financial year.*
- 6.16.2 *As agreed by your Commissioning Team the most appropriate time period has been used for each service line (i.e. UDAs, UOAs etc.) as to not financially disadvantage your contract delivery due to COVID-19.”*

6.17 The letter contained the following table showing the year end reconciliation:

Scheduled UDA 2019/20	Less brought forward UDA from 2018/19	Adjusted Scheduled UDA 2019/20	Contracted UDA 2019/20	% Delivered UDA 2019/20	Carry forward UDA into 2020/21	UDA value (£)	Clawback (£)
946.20	0.00	946.20	1,200.00	78.85	0.00	£33.27	£8,443.93

6.18 The letter went on to state:

“The following time period was used to calculate your UDA activity for the 2019/20 financial year to mitigate the impact of COVID-19 on your contract:

April 2019 to February 2020, plus an average UDA delivery over an appropriate three-month period in 2019/20.

These details are available in your Year-End statement in Compass.”

- 6.19 I note the Contractor’s comment that having requested a full breakdown of figures used to reconcile the figure notified to the Contractor by NHS England on 29 July 2020, the former was unable to reconcile that information provided with the information from the Contractor’s own software system ‘System for Dentists’. I note NHS England’s comment that whilst the Contractor felt that the NHS BSA were not including all of the activity the practice had undertaken during the year, and that the Contractor’s software was reporting a higher number of UDAs, it was not possible to base the reconciliation on the Contractor’s own figures as provider software is set up to accommodate the standard financial year. Provider software figures would therefore be unable to match the figures used for the year end reconciliation as the calculations for year end and Option 3 were calculated by completion date, as opposed to the month that the UDAs were submitted.
- 6.20 In its response to Contractor’s representations, NHS England notes the Contractor’s suggestion that the reason behind its underperformance is an IT system failure. However according to NHS England, this is listed in Annex 49 of the NHS England Policy Book for Primary Dental Services 2018 as a non-allowable circumstance. I note the local Committee’s comment that Providers are aware that they are required to send activity data to NHS DS by way of FP17 submissions on completed courses of treatment. NHS Business Services Authority (NHS BSA) will only review activity data received via this method. The Contractor has not disputed that the IT failure that it considers has occurred, is not an allowable circumstance for the Contractor’s underperformance under the NHS England Policy Book for Primary Dental Services 2018. It is a matter for the Contractor to monitor its system carefully to avoid future possible underperformance.
- 6.21 Paragraph 38 of Schedule 3 of the GDS Regulations provides that:

“Notification of a course of treatment, orthodontic course of treatment etc.

- (1) *The contractor shall, within two months of the date upon which—*
- (a) it completes a course of treatment in respect of mandatory or additional services;*
 - (b) it completes a case assessment in respect of an orthodontic course of treatment that does not lead to a course of treatment;*
 - (c) it provides an orthodontic appliance following a case assessment in respect of orthodontic treatment;*
 - (d) it completes a course of treatment in respect of orthodontic treatment;*
 - (e) a course of treatment in respect of mandatory services or additional services or orthodontic course of treatment is terminated; or*
 - (f) in respect of courses not falling within sub-paragraph (d) or (e), no more services can be provided by virtue of paragraph 5(4)(b) of Schedule 1 (orthodontic course of treatment) or paragraph 6(4)(b) of this Schedule, subject to sub-paragraph (4), send to the Board by means of electronic submission, the information specified in sub-paragraph (2).*
- (2) *The information referred to in sub-paragraph (1) comprise of—*
- (a) details of the patient to whom it provides services;*
 - (b) details of the services provided (including any appliances provided) to that patient;*
 - (c) details of any NHS Charge payable (and paid) by that patient; and*
 - (d) in the case of a patient who is exempt from NHS Charges, the information required under sub-paragraph (3).*
- (3) *In the case of a patient who is exempt from NHS Charges, the contractor must provide the Board (or a person authorised on the Board's behalf) with—*
- (a) such details of that exemption as the Board may reasonably request;*
- and*

(b) the written declaration.

(4) The Board may accept submission of the information mentioned in sub-paragraph (2) in paper form in such exceptional circumstances as the Board may reasonably determine.

(5) In this paragraph, 'electronic submission' means the submission of information electronically via a computer system approved by the Board."

- 6.22 As set out at paragraph 38(1) of Schedule 3 of the Regulations, the Contractor is required to submit details of the completed activity within two months. I am satisfied that each of the parties must be aware of this provision and contracted with each other on this basis.
- 6.23 I note the comments by NHS England that "It has been clearly stated for many years that via communications that contract activity should be monitored via Compass and not software company..." and that "Providers have a duty to effectively manage their contracts by undertaking regular reconciliation of activity against the month end schedules produced by NHS BSA. This provides the opportunity for Providers to escalate any discrepancies in a timely manner during the financial year."
- 6.24 Whilst it appears from the Contractor's documents that there appears to have been a computer system technical fault I also note the Systems for Dentists letter dated 15 March 2021 to the Contractor, a copy of which has been provided to me by the Contractor which states that "Due to this [technical fault] you would have had to change your working methodology and check COMPASS for more information, Unfortunately the NHS BSA is unable to resend the data for errors showing on the differential claims submitted."
- 6.25 The obligation at paragraph 38(1) of Schedule 3 of the Regulations is on the Contractor to submit the information required, within two months. I also consider it appropriate that information submitted by the Contractor is checked by the Contactor on monthly schedules provided by the NHS BSA, as indicated by NHS England. In the event of errors occurring with submission of information, as has occurred now, there should be sufficient time to resolve these with NHS England and still meet the two month deadline.
- 6.26 I am satisfied that NHS England can rely on the information submitted by the Contractor and received by the NHS BSA. In this instance the NHS BSA, acting on behalf of NHS England, has reviewed the matter and used its discretion in applying the most advantageous options of the national methodology in relation to the pandemic and in doing so improved the Contractor's position. I determine that clawback can proceed on this basis.
- 6.27 From the information before me I am of the view that the outcome for the Contractor has resulted in a fair position in that the methodology used has credited the Contractor with an additional 44 UDAs for the relevant period.

7 DECISION

- 7.1 Based on the information provided to me, I am of the view that the methodology used to calculate the UDAs for the Contractor was fair and proportionate.
- 7.2 I note that neither party has requested interest in relation to this dispute and I determine that no interest shall be applied to the clawback of the overpayment made by NHS England to the Contractor.

**Head of Operations, Primary Care Appeals
NHS Resolution**